IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19753 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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WELSPUN INDIA LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MR RAKESH GUPTA , V.NANKANI and MR. K.M.THAKKAR FOR M/S TRIVEDI & GUPTA, ADVOCATES for the Petitioners.
MR DHAVAL G NANAVATI for Respondent Nos.2 - 3.
MR PURVISH J MALKAN for Respondent No.1.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 30/11/2006

ORAL JUDGMENT

The present petition has been preferred challenging the Notification No.08/2006 dated 12th June,2006 issued by Director General of Foreign Trade and Ex-Officio Additional Secretary to the Government of India (Annexure “A” to the memo of the petition), whereby with retrospective effect, clause 3.7.3 of the Foreign Trade Policy,2004-2009, has been amended, consequently, the percentage of the Duty Credit Entitlement has been reduced.

2. An important issue which has arisen for adjudication of this Court is :

> *Whether the respondents have power to issue Notification amending the Foreign Trade Policy with retrospective effect so that the right, which has already accrued in favour of the petitioner can be taken away?*

3. Learned Senior Advocate Mr.Kamal Trivedi for M/s.Trivedi and Gupta Associates for the petitioners mainly submitted that Foreign Trade Policy has been drafted in pursuance of section 5 of the Foreign Trade (Development &

Regulation) Act,1992 (hereinafter referred to as “the Act,1992”). As per this Foreign Trade Policy, “Target Plus Scheme” (TPS) has been introduced under clause 3.7 of Foreign Trade Policy with a view to accelerate, growth in exports by rewarding Star Export Houses, who have achieved a quantum growth in exports.

4. It is further contended by the learned counsel for the petitioners that as per the said Target Plus Scheme for the year 2005-2006, (1st April,2005 to 31st March,2006), all the conditions imposed in Target Plus Scheme have been fulfilled by the petitioners and, therefore, they are entitled to get Duty Credit Entitlement at the rate of 10% of the incremental growth in export for the year 2005-2006 which was 34.06%. The total turnover for the year 2004-2005 was Rs.1039.70 Crores. For the year 2005-2006 because of Target Plus Scheme enshrined in Foreign Trade Policy, the petitioners achieved exports to the tune of Rs.1393.84 Crores. Thus, the petitioners achieved quantum growth of exports at a 34.06%, as against the minimum requirement of 20%. Therefore, as per clause 3.7.3. of the Target

Plus Scheme in Foreign Trade Policy, 2004-2009, the petitioners are entitled to get 10% Duty Credit Entitlement.

5. Learned counsel for the petitioners further submitted that as per handbook of procedure (Foreign Trade Policy,2004-2009), Part-II of Chapter III provides for Promotional Measures wherein, as per clause 3.2.5, a Duty Credit Entitlement Certificate ought to be issued by the respondent authorities, if the conditions imposed are fulfilled. For this, an application can be preferred on or before 31st December. Thus, after the completion of the year 2004-2005, the petitioners were preparing for preferring an application to get Duty Credit Entitlement Certificate from the respondent authorities, on the basis of the right already accrued in favour of the petitioners. Meanwhile, a Notification dated 12th June,2006 (Annexure “A” to the memo of the petition) has been issued by the respondent authorities, whereby the percentage of Duty Credit Entitlement has been reduced. Instead of 10%, it has been revised as 5%. Learned counsel for the petitioners submitted that the

Notification dated 12nd June,2006 has been illegally given retrospective effect i.e. from 1st April,2005. Parent Act namely Foreign Trade (Development and Regulation) Act,1992 does not permit to draft any policy with retrospective effect. Section 5 of the Act of 1992 does not contemplate any policy, which can be effected with retrospective effect and, therefore, the notification dated 12th June,2006 at Annexure “A” to the memo of the petition, which modifies the clause 3.7.3 with retrospective effect deserves to be quashed and set aside.

6. Learned counsel for the petitioners further submitted that once the right is already accrued in favour of the petitioners, it cannot be taken away by the respondents therefore such an amendment can be given prospective effect. Learned counsel for the petitioners has also relied upon several decisions and pointed out that delegated legislation cannot travel beyond the Act, under which, the power is given. Thus, it is submitted that notification dated 12th June,2006 is ultra vires the Act,1992 as per section 5 of the Act,1992. The petitioners have

fulfilled all the conditions imposed under Target Plus Scheme. The year 2004-2005 is already over. Quantum growth in export is more than minimum requirement i.e. the achievement of export is 34.06%, higher than that of the previous year and, therefore, benefit under the Target Plus Scheme ought to be given to the petitioners at 10%, as per clause 3.7.3, as originally contained in the policy. The amendment in the policy through Notification dated 12nd June,2006 (Annexure “A” to the memo of the petition), which reduces the percentage of the Duty Credit Entitlement cannot be given retrospective effect. The judgments cited by the learned counsel for the petitioners have been discussed hereinafter.

7. Learned Additional Solicitor General of India Mr.Vikas Singh with learned counsel Mr.Dhaval Nanavati for the respondents submitted that there is no vested right or accrued right with the petitioners. The right has never accrued in favour of the petitioners to get 10% Duty Credit Entitlement, despite the incremental growth at a 34.06%, in comparison with last year export. What is stated in the policy is, a

probability, but the right to get this benefit is said to have been accrued only upon issuance of notification under section 25 of the Customs Act,1962. This notification has been published on 12nd June,2006 bearing Notification No.08/2006. It is vehementally submitted by the learned counsel for the respondents that the percentage referred to in the Target Plus Scheme for Duty Credit Entitlement was not a final one but looking to clause 3.7.8., Government had reserved the right to make a variation in the percentage or the rate of entitlement under the Scheme effective from the date of notification of the policy and, therefore, looking to the misuse of the policy (as per note at Annexure “C” to the memo of the petition) and keeping in mind, provision of section 3.7.8 of the Target Plus Scheme, the Notification dated 12th June,2006 at Annexure “A” has been published, whereby clause 3.7.3 has been amended with effect from 1st April,2005 so that the rate of entitlement shall now be read as 5% of the incremental growth, which never takes away any accrued right of the petitioners. There is no vested right in the petitioners to get 10% Duty Credit Entitlement of the incremental growth. The

right accrues only when the notification under section 25 of the Customs Act,1962, is published.

8. In support of his contentions, the Learned counsel for the respondents has placed reliance on several judgments, which have been referred hereinafter and it is stated that in view of the aforesaid facts, the Central Government has all power, jurisdiction and authority to modify clause of entitlement i.e. 3.7.3. of the Foreign Trade Policy, 2004-2009 with retrospective effect.

9. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, in my opinion, the Notification No.08/2006 dated 12th June,2006 issued by Director General of Foreign Trade and Ex-Officio Additional Secretary to the Government of India (Annexure “A” to the memo of the petition) is ultra vires the Act of 1992, so far as it gives retrospective effect from 1st April,2005 and, hence, deserves to be quashed and set aside, for the following facts and reasons:

(A) The relevant provisions of the Foreign Trade (Development & Regulation) Act,1992, Foreign Trade Policy (2004-2009), Trade Plus Scheme, read as under:

Section 5 of the Act,1992 reads as under:

> ***"5. Export and import policy.***- *The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."*

In pursuance of the aforesaid section 5 of the Act,1992, Foreign Trade Policy,2004-2009 was framed and as per clause 3.7 of the Foreign Trade Policy, Target Plus Scheme has been introduced. Relevant clauses of the Foreign Trade Policy, 2004-2009, read as under:

> ***3.7.3 Entitlement***
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> *The entitlement under this scheme would be contingent on the percentage incremental growth in FOB value of exports in the current licensing year over the previous licensing year, as under:*

Percentage incremental growth	**Duty Credit Entitlement (as a % of the incremental growth)**
20% and above but below 25%	5%
25% and above but below 100%	10%
100% and above	15% (of 100%)

Note:(1) Incremental growth beyond 100% will not qualify for computation of duty credit entitlement.
(2) For the purpose of this scheme, the export performance shall not be transferred to or transferred from any other exporter. In the case of third party exports, the name of the supporting manufacturer/ manufacturer exporter shall be declared.
(3) Exporters shall have the option to apply for benefit either under the Target Plus Scheme or under the Vishesh Krishi Upaj Yojana, but not both in respect of the same exported product/s. Provided that in calculating the entitlement under Para 3.7.3 the total eligible exports shall be taken into account for computing the percentage incremental growth but the duty credit entitlement shall be arrived at on the eligible exports reduced by the amount on which the benefit is claimed under para 3.8.3.
(4) All exports including exports under free shipping bill verified and authenticated by Customs and Gems & Jewellery shipping bills but excluding exports specified under para 3.7.5, shall be eligible for benefits under the Target Plus Scheme.
(5) In respect of export of Cut & Polished diamonds only those shipments would be taken into account for computation of eligible exports under the scheme where a minimum of 10% value additional has been achieved.

3.7.8 Special Provision

Government reserves the right in public interest, to specify from time to time the category of exports and export products, which shall not be eligible for calculation of incremental growth/entitlement.
Further the Government shall have the right to change the eligibility criteria and rate of entitlement under the scheme effective from the date of notification of this policy.
Similarly, Government may from time to time also notify the list of goods, which shall not be allowed for import under the duty credit entitlement certificate issued under the scheme.

Clause 3.2.5 of Chapter 3 namely Promotional Measures of Part II of Handbook of procedures (Foreign Trader Procedure), reads as under:

3.2.5 Target Plus Scheme

The policy for the Target Plus Scheme is given at Chapter 3 of the Foreign Trade Policy.
I. For direct as well as third party exports, the Export documents viz Export order, Invoice, GR Form, Bank Realization Certificate should be in the name of applicant only.
However for the third party exports, where goods have been procured from a manufacturer, the shipping bill should contain the name of the exporter as well as the supporting manufacturer.
II. Goods allowed to be imported under this scheme shall have a broad nexus with the products exported. For

the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate.

III. The licensing authority shall at the time of issuance of the duty credit entitlement certificate endorse the name of the associate manufacturer/supporting manufacturer/job worker on the certificate as declared by the applicant. Goods imported against such entitlement certificate shall be used by the applicant or his supporting manufacturer/job worker.

Further in order to enable supporting manufacturers, whose names appear in the shipping bills, to import directly, Licensing Authority concerned shall endorse the names of such supporting manufacturers on the certificate as co-licensees.

IV. The last date of filing of such applications shall be 31st December.

V. For each duty credit certificate, split certificates subject to a minimum of Rs 5 lakh each and multiples thereof may also be issued. A fee of Rs.1000/- each shall be paid for each split certificate. However, a request for issuance of split certificate(s) shall be made at the time of application only and shall not be considered at a later stage.

VI. The duty credit certificate shall normally be issued with a single port of registration. However the applicant may choose for different ports of registration for each split certificate.

VII. The duty credit certificate shall be valid for a period of 24 months from the date of issue.

Revalidation of duty credit entitlement certificate shall not be allowed.

VIII. The applicants shall within one month of the last imports made

> *under this certificate or within one month of expiry of the certificate which ever is earlier, submit a statement of imports/utilization made under the certificate as per 'Aayaat Niryaat Form', to the jurisdictional Regional Licensing Authority who have issued the Certificate with a copy to the jurisdictional Excise authorities.*
>
> *(Emphasis supplied)*

The aforesaid provisions have been read and re-read by the learned counsels appearing for both the sides, which clarify the Foreign Trade Policy,2004-2009 and Target Plus Scheme and procedures to get Duty Credit Entitlement Certificate and the last date before which an application can be preferred.

(B) Whether the right has ever accrued in favour of the petitioners?

Learned counsel for the petitioners submitted that in pursuance of the Foreign Trade Policy,2004-2009 enacted under the Act,1992, the Target Plus Scheme has been floated by the Government so as to achieve substantial growth in exports. Conditional benefit has been given in Target Plus Scheme. There is no ambiguity in the conditions nor in the quantum of benefits to be given to the Star Export Houses, which are achieving growth in exports

in comparison with the last year. Keeping in mind, this unequivocal and unambiguous Foreign Trade Policy,2004-2009 and especially Target Plus Scheme, the petitioners intended to achieve growth in exports. For the year 2004-2005, the total export of the petitioners was 1039.70 Crores and for the year 2005-06, the petitioners were able to effect the exports to the tune of Rs.1393.84 Crores. Thus, the petitioner company has already achieved the quantum growth of export at 34.06%, as against minimum requirements of 20% as stated hereinabove. As per clause 3.7.3., a table has been given, whereby Duty Credit Entitlement (as a percentage of the incremental growth) has been given and if percentage incremental growth is 25% or above, but below 100%, Duty Credit Entitlement will be 10%. Thus, the conditions have been fulfilled by the present petitioners for getting the benefit under Target Plus Scheme floated by the respondents. As per clause 3.7 of the Foreign Trade Policy,2004-2009, the current licensing year 2005-2006, which starts from 1st April,2005 to 31st March,2006 is already over. As per procedure enshrined in part-II - Handbook of Procedures, especially as per Chapter-3, the last date for preferring an application was 31st December,

so that Duty Credit Entitlement Certificate can be issued by the authority, (who has issued a policy i.e. Director General of Foreign Trade). Thus, the same authority, which has issued the policy, has to issue, Duty Credit Entitlement Certificate. Looking to the Target Plus Scheme especially clause 3.7.3., the word used is “Entitlement”. The meaning of word “entitlement”, even as per Advanced Law Lexicon, 3rd Edition, reads as under:

> *“**Entitle.** To give a claim, right, or title to; to give a right to demand or receive, to furnish with grounds for claiming. “The word may, without any violence to language may be taken to means “entitled in interest” or “entitled in possession” or “entitled to payment” [Jopp v. Wood, (1865), 2 De J. & S.329: 46 ER 400: 4 De G.J.&S 616' 46 ER 1057]. The interpretation is in each case a question of construction, and no definite rule can be laid down.”*

Thus, all the conditions attached as per Target Plus Scheme have been fulfilled. There are no other conditions in the Target Plus Scheme enshrined in the Foreign Trade Policy,2004-2009. The Scheme is floated to accelerate quantum growth in exports. If, Star Export Houses achieve quantum growth in exports, as stated in clause 3.7.3., they are entitled to get 10% Duty Credit Entitlement. This

right is not contingent or this right (to get 10% Duty Credit Entitlement) is not dependent upon any other conditions, and, therefore, in my opinion, right has already accrued in favour of the petitioners to get Duty Credit Entitlement Certificate, once the minimum quantum of growth in export is achieved, in comparison with the previous year exports. The figures of exports as stated hereinabove are not disputed.

(C) Effect of Customs Act, 1962:

It is stated by the learned counsel for the respondents that the notification issued under the Customs Act,1962, especially section 25 thereof, was published on 10th July,2006, bearing Notification No.73/2006, i.e. after the amendment as per notification dated 12th June,2006 at Annexure “A” to the memo of the petition. Thus, Target Plus Scheme was floated with a promise of 10% Duty Credit Entitlement, if the quantum of growth is more than 25% but less than 100%. It is stated by respondent that this percentage can be varied by the Central Government with retrospective effect and, therefore, it was varied on 12th June,2006. Keeping in mind, all the conditions of Target Plus Scheme, the

notification has been issued on 10th July,2006 under the Customs Act,1962, and, therefore, it cannot be said that there was any right accrued in favour of the petitioners. This contention raised by the learned counsel for the respondents is not accepted by this Court mainly for the reason that custom notification under section 25 is not further crystalising a right, which has already accrued in favour of the petitioners, as per clause 3.7.3. of the Foreign Trade Policy. Notification under the Customs Act,1962 is not giving further strength to the right, which has already accrued in favour of the petitioners as per clause 3.7.3. of the Foreign Trade Policy. Duty Credit Entitlement Certificate is to be issued by the Director General of Foreign Trade as the policy has been enacted by the very same authority. The petitioners are asking for Duty Credit Entitlement Certificate upon fulfillment of all the conditions of the Target Plus Scheme. As per the said Scheme, for the whole year, the petitioners were busy in achieving quantum growth in export i.e. more than minimum growth. This goal has already been achieved by the petitioners for the year 2004-2005 and as per Handbook of Procedures, an application can be preferred on or before 31st December,2006. But the

notification at Annexure “A” has been issued meanwhile on 10th June,2006, so as to reduce the percentage of Duty Credit Entitlement and that too, with effect from 1st April,2005. The notification under the Customs Act,1962 has been issued on 10th July,2006. This notification is nothing but a consequential effect of the benefit, which has already accrued in favour of the petitioners. At least, as per Handbook of Procedures, the petitioners are entitled for Duty Credit Entitlement Certificate, there is already vested right or accrued right in favour of the petitioners, no sooner did, the conditions attached to Target Plus Scheme has been fulfilled for getting the Duty Credit Entitlement Certificate. Thus, notification under the Customs Act is not to have been issued to give strength to the right, which has already accrued in favour of the petitioners, who have achieved this quantum growth of export, but, the Notification under section 5 of the Act of 1992, has been issued so that procedurally a benefit can be given. Thus, the contention raised by the respondent that unless and until notification under Customs Act is issued, it cannot be said that there is vested right or accrued right in

favour of the petitioners. This contention of the learned counsel for the respondents is not accepted by this Court.

(D) Whether a Notification dated 12th June,2006 is ultra vires the Foreign Trade (Development & Regulation) Act,1992 :

To give answer of the aforesaid question, one has to look at the source of the Foreign Trade Policy. Foreign Trade Policy has been enacted under section 5 of the Act,1992, which empowers the respondents to formulate and announce the notification in the Official Gazette, the export and import policy, and may, also in the like manner has power to amend the policy. Thus, Foreign Trade Policy has been formulated and announced for the year 2004-2009 and there is also a concept of Target Plus Scheme for getting quantum growth in exports. The objective of the Target Plus Scheme and eligibility criteria, reads as under:

3.7.1. Objective

The objective of the scheme is to accelerate growth in exports by

rewarding Star Export Houses who have achieved a quantum growth in exports. High performing Star Export Houses shall be entitled for a duty credit based on incremental exports, substantially higher than the general annual export target fixed (Since the target fixed for 2005-06 is 17%, the lower limit of performance for qualifying for rewards is pegged at 20% for the current year).

3.7.2 Eligibility Criteria

All Star Export Houses (including Status Holders as defined in Para 3.7.2.1 of Exim Policy 2002-07) which have achieved a minimum export turnover in free foreign exchange of Rs.10 Crores in the previous licensing year are eligible for consideration under the Target Plus Scheme.

As per further clause of the Target Plus Scheme, clause 3.7.3 is for Entitlement, clause 3.7.6 is for Imports allowed and a provision, which is known as a Special Provision under clause 3.7.8. It is contended by the respondent that as per clause 3.7.8 of Target Plus Scheme, Central Government can vary, the percentage of benefit and notification can be issued to that effect, with retrospective effect. This contention is not accepted by this Court for the reason that if the parent Act namely the Act,1992 is not permitting to pronounce a policy with retrospective effect, it permits not amendment in Export-Import Policy, with retrospective effect and, therefore, notification dated 12th June,2006 issued

bearing No.8/2006 at Annexure “A” to the memo of the petition, cannot be given retrospective effect i.e. from 1st April,2005 but it can be given prospective effect. If a close look is given to this problem, for solution, one has to read the provisions of the Act, under which policy or rule or regulation pronounced or enacted. Here, Section 5 of the Act,1992, does not empower Central Government to announce policy with retrospective effect.

(E) JUDGEMENTS:

(i) It has been held by the Hon'ble Supreme Court in the case **Hukam Chand Etc. V/s. Union of India and others reported in (1972)2 SCC 601** in para 8, 9, 11 and 12, reads as under:

> *“8. Perusal of Section 40 shows that although the power of making rules to carry out the purposes of the Act has been conferred upon the Central Government,* ***there is no provision in the section which may either expressly or by necessary implication show that the Central Government has been vested with power to make rules with retrospective effect.*** *As it is Section 40 of the Act which empowers the Central Government to make rules, the rules would have to conform to that section. The extent and amplitude of the rule making power would depend upon and be governed by the language of the*

section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. ***Likewise, it there was nothing in the language of Section 40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule.*** *The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled (see Craies on Statute Law, p. 297, Sixth Edition).*

9. The learned Solicitor General has not been able to refer to anything in Section 40 from which power of the Central Government to make retrospective rules may be inferred. In the absence of any such power, the Central Government, in our view, acted in excess of its power in so far as it gave retrospective effect to the Explanation to Rule 49. The Explanation, in our opinion, could not operate retrospectively and would be effective for the future from the date it was added in February 1960.

11. In the case of Income Tax Officer, Alleppy v. M. C. Ponnoose and others,etc. (1969) 2 SCC 352 = (1970)1

SCR 678, this Court dealt with a notification dated August 14, 1963, which empowered the revenue officials, including the Tehsildar, to exercise the powers of a tax recovery officer under the Income Tax Act,1961 in respect of arrears. The notification was given retrospective effect. Question which arose for determination was whether the State Government could invest the Tehsildar with such powers retrospectively. Answering this question in the negative, this Court observed:

> *"The Parliament can delegate its legislative power within the recognized limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."*

Reference was made in the above cited case to an earlier decision of this Court in B.S.Vadera, etc. v. Union of India and others, (1968) 3 SCR 575 = (AIR 1969 SC 118) wherein it had been observed with reference to rules framed under the proviso to Articles 309 of the Constitution that those rules could be made with retrospective operation. Vadera's case was distinguished on the

ground that the view expressed therein was based upon the language employed in the proviso to Article 309 that any rules so made shall have effect subject to the provisions of any such Act. It was also observed:

> *"As the Legislature can legislate prospectively as well as retrospectively there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation. For these reasons the ambit and content of the rule-making power under Article 309 can furnish no analogy or parallel to the present case."*
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> *(Emphasis supplied)*

(ii) Likewise, it has been held by the Hon'ble Supreme Court in the case of **Regional Transport Officer, Chittoor and others V/s. Associated Transport Madras (P) Ltd. and others reported in (1980)4 SCC 597** in paras 2 and 3 as under:

> *"2. This sub-rule enabled operators of motor vehicles on inter-State routes lying partly in the Madras State and partly in the State of Andhra Pradesh to pay the tax duly to either of these two States.* ***It was, however, deleted along with sub-rules (3) and (4) on March 29,1963 with effect from April 1,1962 and it is the retrospectively of the deletion that is challenged*** *before us because the Andhra Pradesh State sought to collect tax for the period commencing April 1,1962 from the respondent under the Act above*

> *referred to, although he had already paid the same to the State of Madras. The ground of invalidity was stated to be that Section 4(1) did not confer on the State Government power to make rules with retrospective effect.*
>
> *3. Thus, the only question which engages our attention is as to whether Section 4(1) does confer on the delegate, namely, the State Government, the power to make retrospective rules. The High Court, after an elaborate discussion on the jurisprudence of subordinate legislation, came to the conclusion that no such power was conferred on the State Government and that consequently the deletion which resulted in retrospective operation of the liability to payment of tax was bad in law."*
>
> *(Emphasis supplied)*

(iii) It has been held by the Hon'ble Supreme Court that unless a statute conferring to power to make the Rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. **Para-7** of the case of **The Accountant General and another V/s. S.Doraiswamy and others reported in AIR 1981 SC 783,** as under:

> *"7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation.* ***It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power***

can have prospective operation only. *An exception, however, is the proviso to Art. 309. In B.S.Vadera v. Union of India, (1969) 3 S C R 575 : (AIR 1969 SC 118) this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a Law on the subject matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Art. 309 that "any rules so made shall have effect subject to the provisions of any such Act." Those features are absent, in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until Parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148, confers power on the President to frame rules operating prospectively only.* ***Clearly then, the rules of 1974, cannot have retrospective operation, and therefore sub rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27th July, 1956, must be held ultra vires."***

(Emphasis supplied)

(iv) It has been held by the Hon'ble Supreme

Court reported in the case of **A.A.Calton V/s. Director of Education and another reported in (1983) 3 SCC 33**, relevant part of para-5 reads as under:

> *"5..... ..... But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. ....."*
> *(Emphasis supplied)*

(v) It has been held by the Hon'ble Supreme Court in the case of **Chairman, Railway Board and others V/s. C.R.Rangadhamaiah and others reported in (1997)6 SCC 623** in para-23 and 24, which read as under:

> *"23. The said decision in Raman Lal Keshav Lal Soni of the Constitution Bench of this Court has been followed by various Division Benches of this Court. (See : K. C. Arora v. State of Haryana, (1984) 3 SCR 623 : (AIR 1987 SC 1858); T. R. Kapur v. State of Haryana, (1987) 1 SCR 584 : (AIR 1987 SC 415); P. D. Aggarwal v. State of U. P., (1987) 3 SCR 427: (AIR 1987 SC 1676); K. Narayanan v. State of Karnataka, 1994 Supp (1) SCC 44 : (1993 AIR SCW 3106); Union of India v. Tushar Ranjan Mohanty, (1994) 5 SCC 450; and K. Ravindranath Pai v. State of Karnataka, 1995 Supp (2) SCC 246 : (1995 AIR SCW 3093).*

> *24. In many of these decisions the expressions **"vested rights"** or **"accrued rights"** have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with **effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary,** discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (AIR 1967 SC 1889) (supra); B. S. Yadav (AIR 1981 SC 561) (supra) and Raman Lal Keshav Lal Soni (AIR 1984 SC 161) (supra).”*
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> *(Emphasis supplied)*

(vi) It has been held by Division Bench of this Court in the case of **Dipak Vegetable Oil Industries Ltd. V/s. Union of India reported in 1991(52) ELT 222 (Guj)**, para 10 to 12 thereof, read as under:

> *“10. While it is true that the right to get credit came into existence only on issuance of the aforesaid notifications, on a correct interpretation of Rule 57N read with Rule 57K, it will have to be held that*

the right to utilise-the credit so earned did not come to an end the moment the said notifications were rescinded. In this context it is pertinent to note that only the aforesaid notifications have been reascined and not Rule 57N which confers a right to utilise the credit already earned. A right conferred by a rule could not have been taken away by the Government by merely rescinding the notifications which had brought the said right into existence. The right which the manufacturer had got, no doubt on the issuance of said notifications, was a monetary right and once it got crystalised in terms of money, the same could not have been treated as having come to an end on the day on which the said notifications came to be rescined. As a result of rescission of the said notifications on and from that date onwards, the manufacturer ceased to have the benefit of earning credit of money; but the Government could not have intended to deprive the manufacturer of his right to utilise the credit already earned because that would have been unfair to the manufactures. ***The manufacturers, relying upon the rules and the notifications, used the notified minor oils in the manufacture of Vanaspati or soap, thus suffering a dis-advantage because of the low process yield of such minor oils, but hoping to get credit of money by way of rebate and a further right to utilise that credit for payment of excise duty on the manufacture of Vanaspati and soap.*** *We are, therefore, of the opinion that even after the aforesaid notifications came to be rescinded with effect from 25-8-1989,* ***the credit of money which was earned by the manufacturers of Vanaspati and soap could be utilised by them*** *in terms of the rules and the notifications for payment of excise duty on Vanaspari and soap manufacturered by them after 25-8-1989.*

11. Learned counsel for the petitioners relief upon the decision of the Bombay High Court in Londen Star Diamond Co. (India) Pvt. Ltd. V. Union of India, 1989(43) E.L.T. 47, wherein it was held that the importers who became entitled to receive drawback of 3% as they had imported rough, uncut diamonds and exported them, could not be deprived of the benefit of that drawback as a result of the public notice dated 7-4-1978 by which sub-serial No.5804 and the entries therein relating to cut and polished diamonds were deleted from the table published in the public notice dated 7-10-1977. It was further held that the only manner in which the subsequent public notice could be read was that ***it operated prospectively****, meaning thereby that the drawback was not to be available on import of rough, uncut diamonds meant for exporting them after the issue of the public notice dated 7-4-1978. Though this decision is not directly on the point, it does support the view which we are inclined to take.*

12. In Collector of Central Excise V. Ashoka Mills Ltd., 1989(43) E.L.T.797, the Supreme Court, while considering the effect of withdrawal of Compounded Levy Scheme from 24-7-1972, held that a withdrawal did not result in enhancement of the rate of duty retrospectively on the goods, already cleared even if for captive consumption. It is further held that where the concessional rate of duty is withdrawn, normal rates are made applicable, but the normal rates cannot retrospectively apply to the goods which have been authorisedly removed for captive consumption prior to the withdrawal of consessional rate, ***because there is no principle or statutory language that compels an assessee to be deprived of the concessional rate that has been made***

> ***available to him in respect of the goods produced by it and utilised for captive consumption. What is important to note is that the Supreme Court has recognized the principle that if a manufacturer of goods is entitled to a benefit then he cannot be deprived of the same retrospectively by withdrawing the concession or the benefit by an executive etc.***
>
> *(Emphasis supplied)*

Thus, in view of the aforesaid judgments, it is crystal clear that once the right is already accrued in favour of the petitioners, it cannot be taken away by publishing any notification by giving retrospective effect. If there is nothing in the language in the Act to empower the Central Government, either expressly or by necessary implication to make any policy or rule or regulation, retrospectively, the Central Government would be acting, in excess, of its power, if it gives retrospective effect to any policy or rule or regulation. In the present case also, section 5 of the Act,1992 is not empowering enactment of the policy with retrospective effect. Target Plus Scheme has been enacted as part and parcel of the Foreign Trade Policy pronounced under the Act,1992. After the completion of the whole year 2005-06 and after achieving quantum growth of 34.06 % in comparison with the export for the year 2004-05 and upon

fulfillments of all the conditions of Target Plus Scheme, when the right is already accrued in favour of the petitioners, to get Duty Entitlement Certificate, then the Notification giving retrospective effect of amendment in clause 3.7.3 of the Target Plus Scheme cannot be issued by the respondent. This notification at Annexure “A” is therefore, ultra vires section 5 of the Act,1992 so far as it gives retrospective effect.

10. Learned counsel for the respondents submitted that the rates which are prescribed under Target Plus Scheme, especially clause 3.7.3 for Duty Credit Entitlement are nothing but tentative rates. This argument is not accepted by this Court for the reason that there is no ambiguity or uncertainty in the conditions or in the percentage of Duty Credit Entitlement. On the basis of clause 3.7.8. of Target Plus Scheme, it is contended by the learned counsel for the respondents that at any time, this percentage can be changed, so as to give effect from the date of notification of the Foreign Trade Policy. Clause 3.7.8 of Target Plus Scheme cannot be used to upset the basic features of the Target Plus Scheme. Clause 3.7.8 cannot be used so as to wipe out the most

important ingredient of Target Plus Scheme. On the contrary, such clauses are enacted so that if there is any ambiguity in the policy, it can be later on amended. To take over any body's right is not a goal to be achieved by clause 3.7.8. On the contrary, it increases difficulty to the persons, who are benefited in pursuance of the policy. At one point of time, the learned Additional Solicitor General of India has argued that policy is without teeth and teeth are provided under the notification issued under the Customs Act and, therefore, the respondent has all power, jurisdiction and authority to upset the percentage of benefit, which is given to the petitioners, as per clause 3.7.8. This extreme argument is also not accepted by this Court. There cannot be any policy, which can be enacted as per Section 5 of the Act,1992, which can be made operative with retrospective effect and that too, to take away a right accrued under the Scheme/policy itself. Thus, the retrospective operation of Annexure "A" i.e. Notification No.8/2006 dated 12th June,2006 is ultra vires the Act,1992. It is applicable with prospective effect. Looking to the procedure prescribed in The Handbook of Procedure, Chapter-III, as per clause 3.2.5, last day of filing of an

application for getting Duty Credit Entitlement Certificate is 31st December. Therefore, the petitioners can wait up to that date for preferring the application and meanwhile, this notification has been issued amending the policy with retrospective effect, which is dehors the provisions of the Act,1992 and, therefore, the petitioners are entitled to get Duty Credit Entitlement Certificate at 10% of the incremental growth instead of 5%.

11. Learned counsel for the respondents has heavily relied upon the judgment delivered in the case of **S.B.International Ltd. And others V/s. Asstt. Director General of Foreign Trade and others reported in (1996)2 SCC 439,** especially para-8 thereof. Looking to this judgment and looking to the facts of the present case, they are not matchable to each other and, therefore, the aforesaid judgment is not applicable to the present case. It was a case duty free import on a condition that upon adding the value to the material, which is imported duty free, it ought to be export and, therefore, there is no vested right for the petitioners before the Hon'ble Supreme Court in that case to get advance licence. The facts of the present case are absolutely contrary. Here,

first the export has already taken place. There is a quantum growth by 34.06 % and, thereafter, the present petitioners before this Court are demanding Duty Credit Entitlement Certificate from Director General of Foreign Trade, as per the Target Plus Scheme. If the close look at the aforesaid judgment is given, it is not in favour of the respondents, but, it is in favour of the petitioners. Relevant part of para-8 of the judgment delivered in the case of **S.B.International Ltd. And others V/s. Asstt. Director General of Foreign Trade and others reported in (1996)2 SCC 439,** reads as under:

> *"8. ..... . The situation could have been different if the policy had said that a person exporting goods of a particular value shall be entitled to an import licence of a particular value; in such a case, the export of goods can be said to create a right in the applicant to get an import licence of the specified value. ....."*
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> *(Emphasis supplied)*

Thus, the aforesaid para-8 clearly lays down that the situation could have been different if a first is the export and, then, demand of a licence. Likewise, the learned counsel for the respondents has also relied upon the decisions, which are pertaining to the issuance of writ of mandamus. Looking to the

facts of the present case, they are also not applicable as there is already a vested and accrued right in favour of the present petitioners.

12. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements as stated hereinabove, the notification No.08/2006 dated 12th June,2006 at Annexure “A” to the memo of the petition is hereby declared as ultra vires the Act,1992 so far as it gives retrospective effect and it is held that the petitioners are entitled to get the Duty Credit Entitlement Certificate at 10% of the growth of export. Rule made absolute accordingly with no order as to costs.

(D.N.PATEL,J)

At this stage, learned counsel for the respondents prays for the stay of the aforesaid judgment. It is objected by the learned counsel for the petitioners. Looking to the facts and reasons as stated in the aforesaid judgments, I see no reason to stay the judgment, and, therefore, request made by the learned counsel for the respondents is not accepted by this Court.

(D.N.PATEL,J)

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